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MCLE SELF-STUDY

Idling Ordinances as an Air Quality Improvement Tool for Local Governments

*By Stephanie A. Chavez**

The detrimental effects of poor air quality on a community are becoming clearer every day, especially as it relates to the harm to children. Recent studies[1] have described the costs of air pollution to include: increased episodes of respiratory infections, increased number of missed days from work and school, increased symptoms of asthma, slowed lung function growth in children, and damage to agriculture and the natural environment. Efforts to improve air quality are generally understood to be within the jurisdiction of federal and state environmental protection agencies and regional air districts. Local governments, however, are increasingly working to develop tools and strategies to address these issues.

One recent example involves a city considering enacting an ordinance to regulate commercial vehicle engine idling at industrial and commercial facilities. In order to control the emissions of air contaminants, including oxides of nitrogen, (NOx), carbon dioxide (CO_2), and particulate matter, the proposed ordinance would restrict the location and duration of engine idling by operators of delivery trucks and other commercial vehicles.

Seeking clarification as to the legality of such an ordinance, the California Attorney General's Office was asked by State Assembly Member Dario Frommer whether a city may "enact an ordinance restricting vehicle engine idling for the purpose of controlling or mitigating vehicle emissions." (87 Ops.Cal.Atty.Gen., 2004 Cal. AG LEXIS 24, July 12, 2004.) The Attorney General opined that a city can enact such an ordinance under the following circumstances: (1) the city has been delegated authority to do so by an air pollution control district or by an air quality management district; (2) the ordinance imposes more stringent engine idling requirements than those imposed by such district and is otherwise authorized by law; or (3) the ordinance seeks to abate a nuisance. The following is a summary of the analysis and the conclusions of the Attorney General's Office.

I. POLICE POWER AND PREEMPTION

The Attorney General's analysis of whether a city may enact an ordinance restricting engine idling for the purpose of controlling or mitigating vehicle emissions focused on the doctrine of preemption. The Opinion begins with a discussion of the police powers conferred upon cities and counties by article XI, section 7 of the California Constitution. Section 7 declares a city's and county's power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*." (Italics added.) The police power is broad, limited only by the requirement that cities and counties "exercise their power within their territorial limits and subordinate to state law." (2004 Cal. AG LEXIS 24, *supra*, at p. 2, citing to *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.)

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Given the broad powers under the Constitution, the Attorney General evaluated whether a city ordinance restricting engine idling would be void because it conflicted with general laws. As noted in the Opinion, local legislation conflicts with state law if it "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (2004 Cal. AG LEXIS 24, *supra*, at p. 3; citations omitted.)

II. STATE STATUTORY SCHEME

The general law regarding air quality regulation is set forth in the comprehensive state statutory scheme found in Division 26 of the Health & Safety Code, sections 39000-44474, which provides for "'an intensive, coordinated state, regional, and local effort to protect and enhance the ambient air quality of the state.'" (2004 Cal. AG LEXIS 24, *supra*, at p. 5; citing to § 39000 of the Health & Safety Code.)[2] The statutory scheme grants cities, counties, and air pollution control districts or air quality management districts "primary responsibility for nonvehicular sources of air pollution," while granting the State Air Resources Board (the "Board") "primary responsibility for the control of air pollution by motor vehicles." *Id.* A caveat, however, exists with regard to the Board's responsibility. Sections 39002 and 40000 state that the control of vehicular sources lies with the Board "*except as otherwise provided in this division.*" (2004 Cal. AG LEXIS 24, *supra*, at p. 6; italics added.)

The Attorney General further examined the statutory scheme, moving on to section 40717, which deals specifically with vehicle engine idling. The Attorney General laid out the relevant portions of section 40717 as follows:

> "(a) A district shall adopt, implement, and enforce transportation control measures for the attainment of state or federal ambient air quality standards to the extent necessary to comply with Section 40918, 40919, or 40920.
>
> ". . . . . .
> . . . . . .
>
> "(e) A district may delegate any function with respect to the implementation of transportation control measures to any local agency, if all of the following conditions are met:
>
> "(1) The local agency submits to the district an implementation plan that provides adequate resources to adopt and enforce the measures, and the district approves the plan.
>
> "(2) The local agency adopts and implements measures at least as stringent as those in the district plan.
>
> "(3) The district adopts procedures to review the performance of the local agency in implementing the measures to ensure compliance with the districts plan.
>
> ". . . . . .
> . . . . . .
>
> "(g) For purposes of this section, 'transportation control measures' means any strategy to reduce vehicle trips, vehicle use, vehicle miles traveled, *vehicle idling*, or traffic congestion for the purpose of reducing motor vehicle emissions.
>
> "(h) Nothing in this section shall preclude a local agency from implementing a transportation control measure that exceeds the requirements imposed by an air pollution control district or an air quality management district if otherwise authorized by law." (2004 Cal. AG LEXIS 24, *supra*, at pgs. 7-8 (Italics added).[3]

III. LIMITED REGULATORY AUTHORITY

The Attorney General Opinion states the following with regard to section 40717:

> "[It] is an exception to the general rule stated in sections 39002 and 40000. . . . It gives districts, cities, and counties limited regulatory authority with respect to the adoption and enforcement of 'transportation control measures' (§ 40717, subds. (a), (e)), including a 'strategy to reduce . . . vehicle idling . . . for the purpose of reducing motor vehicles emissions' §40717, subd. (g)." (2004 Cal. AG LEXIS 24, *supra*, at pgs. 8-9)

Of the three circumstances under which a city may enact an ordinance to restrict vehicle engine idling, section 40717 describes two of them. Subdivisions (a) and (e) allow a district, as part of its effort to attain state or federal ambient air quality standards, to delegate to a city "any function with respect to the implementation of transportation control measures, including strategies to reduce vehicle engine idling as defined by subdivision (g). Subdivision (h) of section 40717 permits a city to implement a transportation control measure, including a measure to reduce vehicle idling, when such a measure exceeds the requirements imposed by the district and it is otherwise authorized by law. A city's police power provides the needed authority. (2004 Cal. AG LEXIS 24, *supra*, at pgs. 9-10; citations omitted.)

The third way the Attorney General found that a city may adopt an ordinance restricting vehicle engine idling is through its power to abate nuisances. "Air pollution has long been regarded as a type of nuisance," and section 41509 specifically acknowledges a city's power to "declare, prohibit, or abate nuisances." (2004 Cal. AG LEXIS 24, *supra*, at pgs. 10-12; citations omitted.)

IV. CONCLUSION

Cities have authority to adopt an ordinance restricting vehicle engine idling for the purpose of controlling or mitigating vehicle emissions if: (1) the city has been delegated authority to do so by an air pollution control district or by an air quality management district, (2) the ordinance adopted imposes more stringent engine idling requirements than those imposed by such district and is otherwise authorized by law or (3) the ordinance seeks to abate a nuisance. Such an ordinance, as acknowledged by the Attorney General, would not only be consistent with state regulations, but would also advance and help carry out their goals by further reducing air pollution from vehicular sources.

ENDNOTES

1. *See, e.g.*, Air Quality Management Plan, South Coast Air Quality Management District, August 2003; Traffic and Asthma Prevalence in Children, American J. of Respiratory and Critical Care Medicine, McConnell, K., et al., 165(8):A492 (2002).
2. All section references are to the California Health & Safety Code unless otherwise indicated.
3. "District" means either "an air pollution control district or an air quality management district . . . ." (§ 39025). "Local and regional authorities" are the governing bodies of cities, counties, and districts. (§ 39037).

* Ms. Chavez currently represents private clients in government, business, real estate, and environmental law matters. Her previous experience includes work as a former Deputy City Attorney for several cities in the San Gabriel Valley, and as a member of the Public Affairs Division of the South Coast Air Quality Management District.

MCLE SELF-ASSESSMENT TEST

1. The costs of poor air quality include increased episodes of respiratory infections and missed days from work and school.
   ❑ True ❑ False

2. Federal and state environmental protection agencies have no jurisdiction over air quality.
   ❑ True ❑ False

3. The California Attorney General was recently asked by a State Assembly Member to opine on the legality of a proposed engine idling ordinance.
   ❑ True ❑ False

4. Article XI, Section 7 of the California Constitution grants cities and counties the power to make and enforce ordinances not in conflict with State general laws.
   ❑ True ❑ False

5. The State Air Resources Board has primary responsibility for nonvehicular sources of air pollution.
   ❑ True ❑ False

6. The Health and Safety Code grants cities, counties and air pollution control districts primary responsibility for the control of air pollution by motor vehicles.
   ❑ True ❑ False

7. The Attorney General determined that Section 40717 of the Health and Safety Code grants limited regulatory authority to local governments with respect to the adoption of transportation control measures.
   ❑ True ❑ False

8. An air pollution control district may delegate its authority for implementing strategies to reduce vehicle engine idling.
   ❑ True ❑ False

9. A city does not have the authority to restrict vehicle engine idling through its power to abate nuisances.
   ❑ True ❑ False

10. A city may impose more stringent engine idling requirements than those imposed by state air quality laws or air district regulations.
    ❑ True ❑ False

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2005 Legislative Update

*By Larry A. Thelen, Esq.**

The following are new bills and other legislative matters that may affect Public Law attorneys and their clients.

ACA 1
AUTHOR: Richman (R)
TITLE: Public Employee Defined Contribution Plan
INTRODUCED: 01/06/2005
LOCATION: Assembly
SUMMARY:
Would establish the California Public Employee Defined Contribution Plan. Provides that on and after July 1, 2007, any person hired by a public agency may enroll only in a defined contribution plan of a public pension or retirement system, and is prohibited from enrolling in a defined benefit plan. Permits an active member of a defined benefit plan, during a specified period, to transfer a sum equal to the member's interest in the defined benefit plan to a defined contribution plan.

ACA 2
AUTHOR: Daucher (R)
TITLE: School Districts: Annual Financial Reports
INTRODUCED: 01/06/2005
LOCATION: Assembly
SUMMARY:
Would require a school district to prepare, and make available to the public, an annual report disclosing, for each fiscal year, specified financial information, including revenues from any source, personnel expenses, and outstanding obligations.

SCA 1
AUTHOR: Runner (R)
TITLE: School Districts: Employment Decisions
INTRODUCED: 01/06/2005
LOCATION: Senate
SUMMARY:
Would require that any employment decision by a school district, including a county office of education or charter school, be based solely on employee performance, as assessed annually, and on the needs of the district and its pupils. Provides that employee seniority may not be considered in making an employment decision. Provides that an employee hired by a district on or after the effective date of this measure may be granted tenure only under specified conditions.

AB 108
AUTHOR: Houston (R)
TITLE: Attorney Advertising: Residential Construction Defects
INTRODUCED: 01/11/2005
LOCATION: Assembly
SUMMARY:
Would require an advertisement by a lawyer or law firm that urges a person or entity to take an action that may lead to the filing of a claim for residential construction deficiencies to disclose specified information.

AB 124
AUTHOR: Dymally (D)
TITLE: Civil Service: Equal Opportunity Programs
INTRODUCED: 01/13/2005
LOCATION: Assembly
SUMMARY:
Would require each state agency to establish an equal opportunity program to ensure that the state policy of providing equal access to state jobs, work assignment, training, and other employment-related opportunities for all qualified job applicants and employees, based on merit and nondiscrimination in every aspect of personnel policies and employment practices, is fully implemented.

AB 157
AUTHOR: Levine (D)
TITLE: Tasers
INTRODUCED: 01/14/2005
LOCATION: Assembly
SUMMARY:
Would clarify when the use of a taser constitutes assault upon a person, or to a peace officer or firefighter during the performance of their duties. Would establish the offense of carrying a concealed taser.

AB 159
AUTHOR: Salinas (D)
TITLE: Irrigation Districts: Directors
INTRODUCED: 01/14/2005
LOCATION: Assembly
SUMMARY:
Would require a director to be a voter in the district and a resident of the division that he or she represents; and in the case of a formation election, would require a director to be a resident and voter in the proposed district.

SB 61
AUTHOR: Battin (R)
TITLE: Common Interest Developments: Election
INTRODUCED: 01/14/2005
LOCATION: Senate
SUMMARY:
Would require that elections within a common interest development for specified matters be held by secret ballot. Prohibits a person from counting votes in an election in which he or she is a candidate. Establishes additional procedures for notification of elections and storage and review of election results.

AB 169
AUTHOR: Oropeza (D)
TITLE: Gender Pay Equity
INTRODUCED: 01/20/2005
LOCATION: Assembly
SUMMARY:
Would increase the limit on the amount of damages an aggrieved employee may obtain if successful in bringing a civil action against an employer who has violated existing law to include a specified civil penalty. Mandates the types of damages employees should recover if successful in bringing a civil action against their employer for willful violations of existing law.

AB 174
AUTHOR: Salinas (D)
TITLE: Pajaro Valley Water Management Agency: Eminent Domain
INTRODUCED: 01/20/2005
LOCATION: Assembly
SUMMARY:
Would authorize the Pajaro Valley Water Management Agency to acquire, by eminent domain, property outside the boundaries of the agency, other than property of another

public agency, for the purpose of constructing a specified pipeline and related appurtenant facilities to deliver supplemental water to the agency.

SB 104

AUTHOR: Ortiz (D)
TITLE: Bioterrorism
INTRODUCED: 01/20/2005
LOCATION: Senate
SUMMARY:
Would make an order of a local health officer enforceable immediately by certain state or local peace officers. Extends availability of money budgeted in 2004-05 Budget Act for bioterrorism preparedness through August 30, 2006.

BILL PROPOSAL

TITLE: "Local Government Sunshine Bill"
INTRODUCED: Expected from the Senate Local Government Committee
SUMMARY:

- would define what events constitute occurrences for purposes of reimbursing members of special purpose districts for their attendance.
- would require the legislative body to create detailed expense reports to be filed by members for reimbursement of documented expenses, as defined, and require the members to provide brief reports on meetings attended at the expense of the local agency, thereby imposing a state-mandated local program.
- would specify that local agency expenditures are public records and would specify that local agency expenditures are public records and would specify rates for reimbursement of travel and other expenses.

CALIFORNIA LAW REVISION COMMISSION TENTATIVE RECOMMENDATON

Statute of Limitations for Legal Malpractice
November 2004
SUMMARY:
Disputes over the proper interpretation of the statute of limitations for legal malpractice (Code Civ. Proc. § 340.6) are common. To reduce the number of disputes and improve the functioning of the statute, the Law Revision Commission proposes to:

- Add a new tolling provision, which would apply when an attorney's liability for malpractice may depend on the outcome of an underlying proceeding, such as a lawsuit that the attorney allegedly mishandled.
- Require the plaintiff, rather than the defendant attorney, to bear the burden of proof regarding when the plaintiff discovered, or through reasonable diligence should have discovered, the facts constituting the malpractice.
- Delete an unnecessary and confusing sentence pertaining to "an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future."

The period for commenting on its proposed changes extends through March 31, 2005.

* Mr. Thelen is a member of the Public Law Section's Executive Committee, and Chair of the Committee's Legislation Subcommittee.

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Recent Actions Against Municipal Issuers Clarify Responsibilities

*By Robert W. Doty**

Securities law application to state and local governments has been a fixture of the municipal bond market for three decades. Altogether this author counts 74 enforcement actions against issuers and obligated persons and 50 against officials; not counting dozens of private actions. The SEC has also imposed the first monetary penalty against an issuer in an enforcement action, and issuers (and even board members) have paid or agreed to pay substantial monetary settlements in private actions.

These recent enforcement actions expand issuers' disclosure horizons in important ways.[1] The general rule expressed by the SEC as to issuer responsibilities is as follows:

> [I]ssuers are primarily responsible for the content of their disclosure documents and may be held liable under the federal securities laws for misleading disclosure. ... Because they are ultimately liable for the content of their disclosure, issuers should insist that any persons retained to assist in the preparation of their disclosure documents have a professional understanding of the disclosure requirements under the federal securities laws.[2]

Taken as a whole, the proceedings discussed in this article underscore for issuers and officials the importance of inserting themselves directly and actively into the disclosure process, if they have not done so already. Certainly, the SEC's actions and issuer (and official) liabilities point strongly in that direction.

The actions illustrate several critical lessons for issuers:

- Although some may seek to minimize potential issuer liability risks, litigation costs, as well as remedies, can be appalling; issuers and officials should take those risks very seriously when bond issues are structured and marketed
- Issuers (and officials) can be exposed to actual monetary liabilities
- Issuers (and officials) cannot simply rely on legal and finance professionals when one or more issuer officials know of, or have substantial notice as to, disclosure violations
- Material information that is ambiguous or uncertain nevertheless should be disclosed with careful attention to describing the ambiguities or uncertainties
- Even statements that are literally accurate may mislead due to omission of relevant information
- General disclosure of risks omitting specific known material information is not acceptable disclosure
- Information should not be presented as uncertain when material information is certain (and vice versa)
- Closing certificates containing issuer representations to transaction participants may be cited in litigation as disclosure documents
- State securities laws also create significant responsibilities for issuers (and officials)

Disturbingly, one recent commentary published by Bloomberg news[3] cited results of a survey by William P. Kittredge, of the newly-created nonprofit Center for the Study of Capital Markets and Democracy, suggesting that many issuers and officials still may not undertake key steps vital to their own interests. According to Bloomberg's Joe Mysak,

> In response to the question, "Does your debt policy require or encourage elected officials to thoroughly read the official statement to a bond issue prior to approval?" 53 percent of finance officers replied no.

Though the survey is likely not a scientific one, the results do not reflect the desirable widespread issuer awareness of risks of approving disclosure documents without careful and detailed official review. The following recent actions reinforce the reasons why such reviews are essential.

NESHANNOCK TOWNSHIP SCHOOL DISTRICT

After a period of quiet relating to small and inexperienced issuers, issuer risks were heightened in the SEC's recent action against a small Pennsylvania school district, Neshannock Township School District.[4] In that enforcement action, the SEC, for the first time, went beyond merely ordering the issuer to cease and desist committing antifraud violations, but imposed the added monetary penalties of disgorgement[5] and prejudgment interest.[6] The IRS had determined previously that interest on the District's notes was taxable, resulting in another payment by the District to the IRS to preserve the tax-exempt status of the notes.

The Neshannock District engaged in an issuance of three-year notes, proposed by an underwriter, purportedly for the purpose of financing capital projects. Although the District had a general intention to construct projects at some time, that intention was "exploratory" and ill-defined at the date of note issuance. The District invested the proceeds of sale almost to the notes' maturity.

The District's actions presented questions about the tax exemption for the notes. Federal tax rules afford a temporary period during which proceeds may be invested, but that assumes an intention to use the proceeds eventually for projects.

The District's board members had notice that there could be problems with the transaction. Indeed, some board members "were initially skeptical about the financing proposal" and "raised questions" with legal counsel and the underwriter. After those discussions, the school board unanimously approved the transaction. In the process, the District made inaccurate representations in the District's Official Statement and also in a closing arbitrage certificate.[7] The certificate, which had been drafted by legal counsel, contained representations of the District to the effect that the District intended to expend funds on capital projects. The SEC concluded that the District should have disclosed to investors resulting risks to the tax-exempt status of the bonds.

The SEC's Neshannock release highlights monetary risks for municipal issuers, even

when officials ask questions and receive assurances from legal and finance professionals. District statements in its Official Statement and closing arbitrage certificate,[8] while perhaps appearing superficially accurate to District officials due to the District's general intentions to construct projects, were not materially accurate as to the specific use of the note proceeds, and hence as to federal tax risks important to investors.

DAUPHIN COUNTY GENERAL AUTHORITY

A recent SEC action against the Dauphin County, Pennsylvania, General Authority,[9] related to an Authority bond issue to finance acquisition of an office building. According to the SEC, adding credence to Dr. Kittredge's survey results, "the Authority members read little, if any, of the Preliminary Official Statement prior to their vote" approving the document and authorizing its distribution. The SEC alleged in its action, mentioned below, against the Authority's financial advisor and underwriter, that counsel to the underwriter had drafted the Authority's Official Statement. Therefore, the Authority's disclosure document was prepared by a legal counsel who did not have a contractual relationship with the Authority. The SEC asserted, however, that "The Authority was responsible for the contents of the Official Statement."

The Dauphin County bonds were payable from tenant lease rentals in the acquired building. Much of the space (90%) was occupied by Commonwealth of Pennsylvania departments, including the Department of Transportation ("DOT") (80%, providing 60% of revenues). The DOT's lease, however, was for only three years, after which the DOT was to move to a new building. Indeed, the DOT did move, resulting in a bond default. Despite a tight real estate market (which was mentioned in an appraisal included in the Authority's Official Statement), tax laws severely restricted the Authority's ability to lease space to private tenants.

Prior to the bond issue, "various Authority Board members and professional advisors expressed concerns" about what would happen after the DOT moved. The Authority's financial advisor, Executive Director and others investigated, meeting with a responsible Commonwealth official who declined to commit to future leases, but remained opened to the possibility. Thus, the Authority's Executive Director was aware of the Commonwealth's posture. The Authority's Official Statement disclosed this risk:

> [t]he office leases are scheduled to expire prior to the maturity of the Series 1998 Bonds; there is no commitment, requirement or guarantee that the Commonwealth will renew or extend any of the office leases.

That statement, while literally accurate, was considered by the SEC to be misleadingly general and imprecise, in that the statement "impl[ied] that there was at least a possibility that the State would renew or extend the leases." The statement failed to disclose the specific information that the DOT definitely would be moving in three years, vacating the lion's share of the building. In that regard, an SEC attorney emphasized:

> Municipal bond issuers and other transaction participants cannot just disclose to investors in bond offering documents that something might happen that will threaten the bonds when they know that it definitely will happen ... .[10]

Assertions that the planned move by the DOT was well-known locally did not excuse a failure to make disclosure to investors. According to the SEC's attorney,

> ... it is not the obligation of investors to ferret out information. It's the obligation of the underwriter and the issuer to collect that information and present it to the investors.[11]

As noted above, the SEC also has commenced an action against the Authority's financial advisor and the underwriter.[12] In that action, the SEC alleges that the Authority relied upon advice of the Authority's financial advisor regarding the structure of the transaction and content of the Official Statement and that the financial advisor had a fiduciary relationship to the Authority. Nevertheless, it is cold comfort to issuers that actions may also be brought against other transactional participants, including some upon whom the issuers rely.

MASSACHUSETTS TURNPIKE AUTHORITY

Disclosure in the context of ambiguous and uncertain information was a key issue in an SEC action against the Massachusetts Turnpike Authority ("MTA") and the Authority's Chairman.[13] In that action, the SEC criticized the Authority's disclosures relating to rising costs on the "Big Dig" highway, bridge and tunnel project in Boston.

The MTA provided information in bond offering documents as to the project's costs, but avoided disclosure of cost-overrun information, in part because the information was deemed to be "speculative" in the absence of quantification and confirmation, and in part due to a fear that disclosure might lead to a "self-fulfilling prophecy" of rising costs. The Chairman first ordered a thorough "bottom-up" internal review of costs, and did not disclose the increases pending completion of the detailed and lengthy review.

Despite the Chairman's "effort to control costs," the SEC considered the MTA and the Chairman personally to have committed violations for failure to disclose known information as to the existence of cost overruns that were substantial, albeit uncertain as to amount. It is worth observing that many of the bonds were backed by the Commonwealth's general credit, and some were insured.

SARBAZ ACTION

Obligated persons[14] also can suffer similar treatment in disclosure actions to that of securities issuers. A prime example of the "obligated person" concept is that of developers in land-based financings who pay, and on whose land liens are placed to secure payment of, assessments, taxes or other charges that are to be used to pay principal of and interest on the securities. The land-based sector is far and away the most frequently represented sector in the universe of issue types upon which the SEC has focused.

One of the most recent examples is a pending action affecting a developer (and its controlling officer individually) and an appraiser in a series of land-based financings.[15] Among other things, the familiar theme of a failure to disclose developer financial information appropriately is a key element of the litigation, as is the SEC's challenge to methodology and disclosure regarding land appraisals. The results of that action are yet to be determined. The underwriter of the bonds was the subject of the only injunction ever issued to stop a municipal bond issue in progress,[16] again reflecting the fact that multiple transactional participants may suffer in a poorly-disclosed transaction.

HOLMES HARBOR SEWER DISTRICT

Issuers and officials incurred liabilities in private litigation solely under state securities laws in the Holmes Harbor Sewer District litigation. The case involves yet another land-based financing (specifically assessment-backed bonds in Washington State). The issuing District and its Commissioners paid several hundred thousand dollars to settle claims.[17] Commissioners had asked questions and received assurances from bond counsel and co-bond counsel, each of whom were held by the lower court to have committed malpractice.[18] Criminal charges and an SEC enforcement

action are pending against the project developer, developer officials and others.[19]

CITY OF SPOKANE

In federal and state securities law litigation against the City of Spokane relating to revenue bonds for parking facilities benefiting a private shopping mall developer, the City agreed, partially in consideration of an assignment of investors' claims against other offering participants, to pay from City funds all of the outstanding bond principal and unpaid accrued interest.[20] For the payment (and to pay IRS penalties), the City intends to issue up to $39 million in new bonds backed by the City's credit. The City had asserted reliance on various experts, legal and financial professionals, and the project developer.

SUMMARY

Recent actions demonstrate that securities law responsibilities of issuers (and officials) are continuing to evolve significantly through SEC enforcement and private litigation. The activity of recent months illustrates the wide variety of subjects and settings within which disclosure violations may occur and the importance of careful drafting and issuer review of disclosure language. One message that appears over and over is that the SEC expects issuers to take responsibility for their disclosure documents, even if other parties have their own responsibilities.

Therefore, issuers and officials should be active in their own interests by asking questions and receiving assurances, and also by reviewing carefully, in the light of known or readily-available specific information, the offering and closing documents the issuers and officials approve and execute. It may be difficult, especially when complex documents go beyond the experience of issuer officials or when information is ambiguous or uncertain, but those circumstances may be precisely the ones presenting the greatest need for care.

ENDNOTES

1. Litigation documents, including SEC releases, cited in this paper are available at *http://www.agfs.com/securitieslaws.asp*.
2. SEC Rel. No. 34-26100, 53 F.R. 37778, 28811 n.84 (July 10, 1989).
3. Mysak, *"Municipal Market Goes Under the Magnifying Glass,"* Bloomberg News (Apr. 16, 2004).
4. *In the Matter of Neshannock Township School District,* SEC Rel. Nos. 33-8411, 34-49600 (Apr. 22, 2004).
5. Disgorgement is a remedy pursuant to which the District was required to relinquish "ill-gotten gains," as opposed to paying damages to investors. Indeed, it appears that no investors suffered any actual monetary losses, since a payment was made to the IRS to preserve the tax-exemption of interest on the District's notes.
6. Prejudgment interest is interest accruing on the amount paid pursuant to the basic monetary remedy (in this action, disgorgement) prior to the determination that money should be paid.
7. An arbitrage certificate is a highly complex tax certificate delivered at the closing of a tax-exempt securities issue. Among other things, the certificate generally contains an issuer's representations as to the use of the proceeds of sale of the securities, and as to how, and the conditions under which, funds are intended to be invested. Due to its complexity, an arbitrage certificate is almost always prepared by legal counsel based on discussions with the issuer and other transaction participants. The complexity of the arcane language of such a certificate is such as to make it virtually incomprehensible to a layperson in the absence of extensive detailed review.
8. The notion that a closing certificate is a disclosure document was set forth several years earlier against numerous small general governmental issuers in *In the Matter of Coahoma County, MS, et al.*, SEC Rel. Nos. 33-7554, 34-40194 (July 13, 1998).
9. *In the Matter of Dauphin County General Authority,* SEC Rel. No. 33-8415 (Apr. 26, 2004).
10. Hume, *"SEC Enforcement Case Shows General Disclosure Not Enough,"* The Bond Buyer Online (Apr. 27, 2004), paraphrasing comments of Mark Zehner.
11. *Id.*
12. "Commission Charges Public Finance Consultants, Inc., Robert Fowler, Dolphin and Bradbury, Incorporated, and Robert Bradbury with Violations of the Antifraud Provisions of the Federal Securities Laws in Connection with a $75.35 Million Offering of Municipal Securities," SEC Rel. Nos. 33-8414, 34-49619 (Apr. 26, 2004); *In the Matter of Public Finance Consultants, Inc., Robert D. Fowler, Dolphin and Bradbury, Incorporated, and Robert J. Bradbury,* Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b), 15B and 21C of the Securities Exchange Act of 1934, Admin. Proc. 3-11465 (Apr. 26, 2004).
13. *In the Matter of The Massachusetts Turnpike Authority and James J. Kerasiotes,* SEC Rel. No. 33-8260 (July 31, 2003).
14. In SEC Rule 15c2-12, the SEC defines the "obligated person" concept as follows:

    (10) The term *obligated person* means any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person committed by contract or other arrangement to support payment of all, or part of the obligations on the municipal securities to be sold in the Offering (other than providers of municipal bond insurance, letters of credit, or other liquidity facilities).
15. *SEC v. Sarbaz, et al.*, Case No. 03-1310 JSL (CTX) (Complaint filed Feb. 27, 2003) (C.D. CA).
16. *Securities and Exchange Commission v. David Fitzgerald and Pacific Genesis Group, Inc.*, United States District Court for the Northern District of California, Civil Action No. C-00-4802 (CRB), SEC Lit. Rel. No. 16907 (Feb. 23, 2001).
17. *Trimble, et al. v. Holmes Harbor Sewer District, et al.*, Class Action No. 01-2-00751-8 (Settlement Agreement) (Super. Ct. of Island County, WA).
18. *Trimble, et al. v. Holmes Harbor Sewer District, et al.*, Class Action Nos. 01-2-00751-8 and 02-2-00223-9 (Verbatim Report of Court's Ruling, Feb. 24, 2003) (Super. Ct. of Island County, WA). The ruling is on appeal.
19. *SEC v. Terry Richard Martin, Silver Legacy Corporation, Silver Sound LLC, Jonas David Smith, Michael W. McCall, Charles J. Tull, Ibis Securities LLC, Kenneth R. Martin, George Tamura, Goldman Sig, Inc. Edward L. Tezak, Signal Mortgage Inc., and John H. White,* SEC Lit. Rel. No. 18315 (Aug. 28, 2003).
20. *In re River Park Square Project Bond Litigation,* Case No. CS-01-0127-EFS (Stipulation and Settlement Agreement) (E.D. WA); *In re River Park Square Project Bond Litigation,* Case No. CS-01-0127-EFS (Second Stipulation and Settlement Agreement) (E.D. WA).

* Robert Doty is a Certified Independent Public Finance Advisor and a member of the State Bar of California and the bars of Texas, Ohio and New York. He received his law degree from Harvard Law School. Mr. Doty is author of seminal works on securities law application to municipal securities transactions, and is currently expanding his books entitled **DISCLOSURE & SECURITIES LAW FOR THE MUNICIPAL MARKET**sm as a sequel to **SECURITIES LAW FOR MUNICIPAL FINANCE ADVISORS**sm. American Governmental Financial Services company is a private firm.

Roderick E. Walston Honored as 2004 Public Lawyer of the Year

Roderick E. Walston, a lifelong public lawyer, was selected as the 2004 Public Lawyer of the Year by the Public Law Section. He received the prestigious annual award from California Chief Justice Ronald M. George at the State Bar Annual Meeting in October 2004.

Every year, the Public Law Section nominates a recipient for the Public Lawyer of the Year Award. The Award is intended to recognize career accomplishments in the field of public law. The 2004 Award recognized the long-standing contributions of Roderick Walston to the fields of water law, natural resources law, and environmental law.

Walston's career in public service spans over 43 years. After graduating from Columbia University and Stanford Law School, where he was an editor of the *Stanford Law Review*, Walston served as a Law Clerk to Judge M. Oliver Koelsch of the Ninth Circuit Court of Appeals from 1961 to 1962. Thereafter, Walston began a long and distinguished career as an attorney with the California Department of Justice.

Walston was one of the first members of the Justice Department's natural resources practice group, and he quickly became a leader in the field of water rights law. While a Deputy Attorney General, Walston argued many cases before the United States Supreme Court, California Supreme Court, and other appellate courts. Some of Walston's major cases include *California v. United States*, a 1978 case in which the U.S Supreme Court held that federal agencies must comply with state water laws when operating federal reclamation projects; and *California v. Cabazon Band of Mission Indians*, a 1987 case regarding state regulation of Indian gaming. Another notable case is 1983's *National Audubon Society v. Superior Court*, in which the California Supreme Court held the public trust doctrine applies to water rights. This was a landmark case in the evolving law of the public trust. In 1997, Walston received the U.S. Supreme Court "Best Brief Award" from the National Association of Attorneys General.

Walston left State service in 2000 to become General Counsel of the Metropolitan Water District of Southern California, the largest municipal water agency in the United States. In 2002, Walston was nominated by the President of the United States as Deputy Solicitor of the U.S. Department of the Interior. In April 2004, Walston left Interior as the Acting Solicitor to join the law firm of Stoel Rives in San Francisco, where he is a member of the firm's Resources, Development, and Environment Group.

REMARKS BY CHIEF JUSTICE RONALD M. GEORGE

Good evening. It's a great pleasure for me to join you once again to present the Public Lawyer of the Year award. As you know, I have spent my entire career in the law in public service, first as a Deputy Attorney General and then as a member of the California bench for the past 32 years.

I have a great appreciation for attorneys who have devoted their professional lives to public service—not only because I share their commitment, but because I have seen how their contributions truly have benefited the public. Public lawyers are at the heart of our system of government. Every day, these individuals defend the Constitution and the laws and regulations enacted by the legislative and executive branches, seek to promote the public good, and work on behalf of us all.

Being a public lawyer clearly is not the most remunerative career for an individual graduating from law school today. But I would argue that it is one of the most rewarding in other, very valuable ways. A public lawyer may serve as a senior attorney in a nationwide agency, work for a small local utility district, focus on municipal affairs, represent the business of the state, protect the integrity of the laws enacted by our sister branches, or ensure public protection through the oversight of a licensing agency. And that list barely touches the tremendous variety of practices encompassed by the term "public lawyer." The opportunities provided by public legal service for having an effect on the development and shape of our society are endless.

Nor is this all about doing good for others. Not only can public lawyers use their skills to benefit the public, but they can find issues and areas of abiding interest and professional engagement that will sustain themselves during the course of a long and happy career.

Tonight's honoree, Roderick E. Walston, is just such an individual. He joined the California Department of Justice as a Deputy Attorney General after serving for a year as a law clerk to Judge M. Oliver Koelsch of the Ninth Circuit. In fact, he began his state service in 1962—a couple years before I became a Deputy Attorney General in Los Angeles.

Rod began to develop an expertise in natural resources law, particularly water rights. He soon specialized in arguing cases before the appellate courts. During his years in the Department of Justice he represented the State of California in seven cases before the United States Supreme Court, and many others before the California Supreme Court and intermediate appellate courts in both the state and federal systems. His contributions have greatly helped to shape much of California's jurisprudence—if not the nation's—particularly in the area of water rights. He has handled many cases that have played a crucial role in delineating the relationship between state and federal regulation in this area.

Over the years, Rod's accomplishments accumulated. After serving as an early member of the Justice Department's natural resources practice group, he became a leader in water rights law. In 1991, he became Chief Assistant Attorney General for the Public

Rights Division. During his tenure in that position, in 1997, Rod received the National Association of Attorneys General award for best United States Supreme Court brief for his submission in *Bennett v. Spear*, 520 U.S. 154 (1997). In 1999-2000, he was selected as Special Counsel in the California Attorney General's Office.

When Rod left state service in 2000, he did not leave public law. Instead, he dipped his toe into local water issues while serving as General Counsel for the Metropolitan Water District of Southern California from 2000 to 2002. This, by the way, is the largest municipal water agency in the United States.

In 2002, he was nominated by President George W. Bush to serve as Deputy Solicitor of the United States Department of the Interior, giving him a chance to view public law from a national perspective. When he left to finally join the private sector, he was serving as Acting Solicitor of the Department. Rod is now in practice in San Francisco, as a member of Stoel Rives' Resources, Development, and Environment Group.

Rod, congratulations. Your career demonstrates vividly the wide variety of rewards and challenges that are offered to those who enter the public sector. On behalf of the judicial branch, thank you for your many contributions to the development of the law. It is with great pleasure that I present you with the 2004 Award for Public Lawyer of the Year.

REMARKS OF THE PUBLIC LAWYER OF THE YEAR RODERICK E. WALSTON

Thank you very much, Mr. Chief Justice, for presenting this award. I am very honored and grateful to receive it. I know that there are hundreds if not thousands of qualified candidates for this award, and I am very privileged to be selected this year. I can't think of a higher honor for one who has spent his entire career in the public sector than to receive this award, which reflects the views of peers and associates who understand the importance of public law in our society. Although I recently entered private law practice, my perspective of the law has not appreciably changed. I still tend to view issues through the prism of public policy, and probably always will. This is what happens to one who has spent his career in public law.

As the Chief Justice noted, I have served as an attorney in many government agencies—the California Attorney General's office, the Metropolitan Water District, and the Department of the Interior. The transition from state government to the federal government was especially interesting, because I took many positions adverse to the federal position when I was in the California Attorney General's Office and then had to take opposite positions when I joined the federal government. Actually, it wasn't as difficult as it seems. In fact, I was able to use many of my briefs that I had worked on in the California Attorney General's office when I joined the federal government—I just had to insert the word "not" in a lot of sentences.

Although I am very grateful to receive this award, I believe that the award is less to honor me than the thousands of dedicated public lawyers in California. These public lawyers are found in many different offices—the Attorney General's office (where I spent much of my career), the district attorneys' offices, the city and county attorney offices, the various departments and agencies of governments at all levels (federal, state, local), regional districts (like Metropolitan Water District, where I used to work)—even the courts, which employ research attorneys and clerks. These public lawyers serve many different agencies belonging to many different governments, but they have one thing in common—they represent the people and their interests in the courts and in transactional work, often at a considerable degree of personal sacrifice. Many people here today either work in public law or have done so—such as Chief Justice Ron George, who started his career in the Attorney General's Office. In accepting this award, I feel that I am standing in for the thousands of lawyers who work in the public law sector, and am very honored to do so.

I have always believed that law is a very high calling and that public service is a high calling, and therefore that public service in the law is an especially high calling. When I graduated from law school, I was resolved to spend my career in public service, in one way or another. I have been very fortunate to have done that. Public lawyers ply their craft in the spirit of the ancient Athenians, who were required to swear an oath that said, in part:

> "We will strive unceasingly to quicken the public sense of civic duty. In all these ways, we will transmit a city that is not less but rather far greater and more beautiful than was transmitted to us."

That ancient Athenian oath might well be a motto for all public lawyers.

I am very encouraged by the fact that lawyers are increasingly making a career of public service. It wasn't always so. When I started in the Attorney General's office many years ago, it was generally assumed that you would spend 2-3 years in the public sector and then migrate to the private sector. The Assistant Attorney General who offered me a job asked me to give a moral commitment that I would stay for at least three years. Although I wanted to work in the public sector, I was initially reluctant to make this kind of moral commitment. After thinking about it for a day or so, I finally agreed. When I left the Attorney General's office thirty-seven years later, I felt that I had kept my end of the bargain. Today, many lawyers are increasingly finding a permanent career home in the public sector. This reflects an increasing commitment to public service by much of California's legal community.

The reason that many lawyers are choosing public law careers is because they can

Left: Public Law Section Executive Committee Chair William Seligmann with 2004 Public Lawyer of the Year Roderick Walston.
Above: Chief Justice Ronald George presents the 2004 Public Lawyer of the Year Award to Roderick Walston.

have a great impact on the development of the law, and on the society governed by those laws. Government is the one institution in our nation that is directly charged to represent the interest of the people. Many of our great legal issues (especially in the environmental field, where I practice) involve government, whether federal, state or local, whether as plaintiff or defendant. Therefore, those who represent government in our courtrooms have an opportunity to contribute to the development of our laws.

Although public lawyers generally receive less remuneration than their counterparts in private law, they are rich in the knowledge that they represent the public and its interest. This was driven home to me when I argued the Mono Lake case in the California Supreme Court many years ago. There were many lawyers in the courtroom that day, representing many different interests. I was the only lawyer from the Attorney General's office who argued. I was making an "exhaustion of administrative remedies" argument that all other lawyers opposed. Justice Newman asked me, "Counselor, you are the only lawyer making the exhaustion argument. Would you please explain the argument." Before responding on the merits, I said that although I was the only attorney making this argument, I alone represented the people of California. I didn't push the point by saying that I represented Justice Newman. But my point (and I believe that Justice Newman appreciated it) was that I alone represented the people of California and their interests in that courtroom on that day.

And this has been one of my greatest satisfactions as a public lawyer—knowing that when I am standing alone on my side of the courtroom and there are many lawyers on the other side, I am not alone because my clients are the people of California. This has been a source of much professional pride and satisfaction to me.

So thank you very much for this award. I accept it with gratitude and appreciation on behalf of all the public lawyers of California.

Public Law Section Executive Committee Members Peter von Haam and Fazle Quadri, Chair William Seligmann, and Section Coordinator Thomas Pye at the Ceremony.

Executive Committee Member Larry Thelen, Suzanne Thelen, 2004 Public Lawyer of the Year Roderick Walston, and Executive Committee Member Augustin Jimenez.

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2005 PUBLIC LAWYER OF THE YEAR

Do you know a public law practitioner who deserves special recognition because of outstanding service to the public?

If so, that person could be the recipient of the Public Law Section's "Public Lawyer of the Year" award.

Each year the Public Law Section honors a public lawyer selected by the Public Law Section Executive Committee from nominations sent in by members of the Public Law Section, the State Bar, and the public at large.

For the award, the Public Law Section Executive Committee is looking for an active, practicing public lawyer who meets the following criteria:

1. At least 5 years of recent, continuous practice in Public Law.
2. An exemplary record and reputation in the legal community.
3. The highest ethical standards.

Not necessarily a political figure or headliner, the ideal recipient would be a Public Law practitioner who has excelled in his or her public service without fanfare. The Public Law Section Executive Committee supports the goal of diversity in the membership and leadership of the State Bar. Accordingly, the Executive Committee will ensure that the achievements of all outstanding members of the Bar who practice public law are carefully considered.

Nominations are now being accepted. The 2005 Public Lawyer of the Year award will be presented at the State Bar Annual Meeting in San Diego on September 9, 2005.

Send nominations, no later than 12:00 midnight, June 1, 2005, to:
Tricia Horan, Public Law Section, State Bar of California, 180 Howard Street, San Francisco, CA 94102-4498

To nominate an individual for this award, fill out the official nomination form below.

Nominee's Name: _____

Years of Public Law Practice: _____ **Place of Business:** _____

Brief statement why Nominee deserves recognition: _____

_____

_____

Nominator's Name: _____ **Telephone Number:** _____

Address: _____

A Message from the Chair

By William R. Seligmann, Esq.

It is with great anticipation that I author my first message as Chair of the Public Law Section Executive Committee. My predecessors have left me with an ambitious legacy and some very large shoes to fill; and they have my enduring gratitude.

For those of you that were unable to attend the Public Lawyer of the Year Award presentation at this year's State Bar Annual Meeting, you missed a memorable event. This year, Chief Justice Ronald George presented the award to Roderick E. Walston, whose career achievements include numerous cases that have shaped Environmental, Natural Resources, and Water law. It was truly an event that bespoke the best of our profession; and I would like to personally thank those of you who contributed to the success of the event.

In addition to the Public Lawyer of the Year Award, the Public Law Section was able to present nine programs of interest to public lawyers at the Annual Meeting. In keeping with our commitment to providing relevant educational programs, the Public Law Section also co-sponsored a symposium on Financing Local Government in the 21st Century with the Municipal Law Institute, and the Annual UCLA Land Use Law and Planning Conference. At this year's Section Education Institute in San Francisco, the Public Law Section presented six (6) interesting programs, including: *Bias and the Legal Profession, Government Agency Use of Religious Symbols and References, Substance Abuse and the Legal Profession, Access to State and Local Government Records, Local Government Agency Open Meeting Law,* and *California Tort Claims Act and Governmental Immunities.* For more information on the Public Law Section's continuing efforts to provide interesting and enlightening curriculum, check out the Public Law Section's web pages on the State Bar Web Site.

I also hope that you enjoy this issue of the Public Law Journal; and I look forward to this coming year.

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Use this application form. If you are already a member, give it to a partner, associate, or friend.
Membership will help you SERVE YOUR CLIENTS and SERVE YOURSELF now and in the future.

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